No. 20,548

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES H. GONDER and
MARY D. GONDER,
Appellants,

vs.

HOYT F. KELLEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT.

This is an appeal from the September 21, 1965 decision of the United States District Court for the Northern District of California, Southern Division, holding the debt owing from bankrupt appellee to appellants dischargeable under Section 17 a(2) of the Bankruptcy Act. (1 TR 41).

On August 24, 1964 the Bankrupt filed his petition in Bankruptcy, duly scheduling therein a debt to Appellants. Appellants filed their unverified Application to Determine Dischargeability of Debt on October 28, 1964. (1 TR 1). In a decision of February 26, 1965, the debt of the Bankrupt to Appellants was held by the Referee to be a willful and malicious injury to the property of another within the meaning of the Bankruptcy Act Section 17 a(2), and thus not dischargeable. (1 TR 9).

A Petition for Review was duly filed by the Bankrupt Appellee pursuant to Bankruptcy Act, Section 39 (c) and 11 USCA 67 (c) (1 TR 15). After review, the District Court, in an opinion filed by the Honorable W. T. Sweigert on September 21, 1965, reversed the Referee's decision and held the debt to be discharged on the ground that the compromise agreement of January 10, 1965, constituted a novation whereby the antecedent tort obligation was extinguished. (1 TR 45-47).

Appellants appeal from the District Court decision pursuant to Bankruptcy Act, Section 24 and 11 USC 47.

STATEMENT OF THE CASE.

Appellants statement of the case is sketchy and incomplete. Accordingly, Appellee will set forth herein a more detailed statement of all facts considered by the District Court as important to the determination of this case.

On September 1, 1960, and at all times important herein, the Bankrupt was president of Century Enterprises, Inc., (hereinafter referred to as "Century"), a California corporation, and one Earl J. Messier was vice-president of said corporation. The Bankrupt and Messier were the sole owners and managers of Century. (2 TR 47, 62, 63). On the above date the Bankrupt and Messier, acting on behalf of Century, entered into an agreement with Appellants which provided that Appellants deliver funds to Century to be used by it to secure an inventory of trust deeds, that Century would maintain said funds in a trust account at a bank and not withdraw said funds except upon simultaneous assignment to Appellants of valid promissory notes secured by deeds of trust in the amount of withdrawal, and that Appellants would receive a return of 20% interest on their funds deposited with Century. (Objectors Exhibit 7, being Exhibit B of Bankrupt's Answer to Superior Court Action No. 151227; 2 TR 47). At the time of this agreement Appellants deposited $6,000.00 with Century and on September 6, 1960, they deposited the further sum of $1,500.00 with Century. (2 TR 49).

On October 21, 1960, the Bankrupt and Messier, both acting on behalf of Century, entered into an agreement of modification with Appellants whereby the agreement of September 1, 1960, was modified. (Objector's Exhibit 7; 2 TR 49). Under the modification, the Appellants transferred eleven promissory notes and deeds of trust to Century and Century agreed to credit the sum of $25,957.51 to the trust account of Appellants. This modification also provided that Century would pay Appellants 20% interest per annum on Appellants balance of $33,475.51 in monthly payments of $567.79. (Objector's Exhibit 7; 2 TR 62).

From November 1, 1960 to May 1, 1962, Appellants received $567.79 monthly for a total of $10,788.01. Thereafter, Century failed to make any further payments to Appellants. (2 TR 90). The Bankrupt repeatedly denied converting to his own use any of the funds deposited by Appellants with Century (2 TR 61, 62, 64, 65, 68, 69); the Referee found, and the District Court accepted said finding as true, that the Bankrupt failed to deposit and maintain the funds of Appellants in a trust account at a bank, but commingled said funds with his own personal funds and converted the same to his own personal use and benefit. (1 TR 9, 42).

On January 10, 1963, the Bankrupt and his wife, Lois Kelley, and Century Enterprises, Inc., entered into an Agreement with Appellants in order "to amicably settle the matters existing between them and to avoid litigation." In the execution of this Agreement,

Appellants had the benefit of advice by their own attorney. (Objector's Exhibit 7, being Exhibit A to Bankrupt's Answer in Superior Court Action No. 151227).

The Agreement provides that the Bankrupt and his wife in their individual capacities, and Century Enterprises, Inc., shall make, execute and deliver to Appellants their promissory note in "the sum of $18,443.13, payable at $500.00 per month or more, including interest at the rate of ten (10%) percent interest on the declining balance from January 1, 1963, with installments due on the first day of each and every month, commencing February 1, 1963." (Objector's Exhibit 7). The Agreement also contained the following provisions which, because of their importance on the issue of novation, are set forth at length below:

> "2. That in consideration of the terms, conditions and covenants of this agreement, First Parties (Appellants) *do* for themselves, their heirs, executors, administrators and assigns, *agree* with Second Parties (Appellee, his wife, and Century), their heirs, executors, administrators and successors, that *neither of First Parties will apply or jointly institute any suit*, action at law or equity or proceeding against Second Parties or any of them, *nor in any way, institute or prosecute any claim, demand action or cause of action for such claim, damage, loss, recovery or expense of any nature arising out of the transaction between First Parties and Second Parties hereinabove referred to* (referring to Agreements of September 1, 1960 and October 21, 1960 between Appellants and Century). No provision herein shall, however, in any manner be construed or intended to limit, affect or impair the right of First Parties to act upon the promissory note

agreed to be delivered by the terms of this agreement in the event of a failure of the Second Parties to make the payments as provided for therein, including attorney fees and court costs."

"3. Nothing, however, contained in this agreement shall deprive First Parties from proceeding with any action which they may deem advisable upon that certain Bond No. S 26-08-34 issued by the Indemnity Company of North America, indemnifying Century Enterprises, Inc. from any losses sustained by reasons of any action of their employees in the use of funds belonging to others . . . It is specifically understood that this agreement may not be pleaded as either a complete or partial defense to any action or other proceeding that First Parties may take upon the bond. . . ." (Emphasis added).

Pursuant to the aforesaid Agreement, Appellants accepted the note and the Bankrupt and his wife made payments to Appellants of $500.00 per month from March 1, 1963, through July 1, 1963. (Objector's Exhibit 6, being Appellants' complaint in Superior Court Action No. 151227). The Bankrupt and his wife defaulted on said promissory note, and on November 15, 1963, Appellants commenced Action No. 151227 in the Superior Court of the State of California, in and for the County of Santa Clara, pleading only the promissory note and non-payment thereof. (Objector's Exhibit 6; 1 TR 6). The Bankrupt and his wife answered and raised the affirmative defense that the promissory note included interest at a usurious rate, namely twenty (20%) percent per annum. (Objector's Exhibit 7). Before trial, the usury defense, a stay of execution, and possible bankruptcy were discussed. (2 TR 87, 88, 92). The parties then entered into a

stipulation for Judgment whereby it was agreed that the Bankrupt, his wife, and Century have judgment against them for "the sum of $16,842.41 principal, interest from July 1, 1963, to date at seven (7%) percent per annum amounting to $717.71, $2,000.00 attorneys fees and $34.50 costs. (Objector's Exhibit 5). On February 11, 1964, Judgment was entered in favor of Appellants and against the Bankrupt, his wife, and Century for $20,094.62. (Objector's Exhibit 8).

After the Referee's decision holding the Bankrupt's debt to Appellants to be non-dischargeable was filed, the Appellants filed a Memorandum of Costs and Disbursements in Superior Court Action 151227, listing a Sheriff's fee for levy on real property. The Bankrupt then learned that Appellants caused a Writ of Execution to be issued on November 4, 1964, caused a levy to be made on property allegedly owned by the Bankrupt, bid $5,000.00 for the Bankrupt's alleged interest in said property, and received the Sheriff's Certificate of Sale in January, 1965. When the Bankrupt opposed the cost bill, Appellants stipulated to a $5,000.00 reduction in their Judgment. (1 TR 33). In their Memorandum of Points and Authorities to the District Court on the Petition for Review, Appellants agreed that the foregoing facts relative to pressing their Judgment to execution sale be considered by the District Court. (1 TR 40).

The Bankrupt sought a review of the Referee's Order contending among other grounds, that the agreement of January 10, 1963, was intended by the

parties as a full compromise and settlement of all claims arising under the agreements of September 1, 1960 and October 21, 1960. (1 TR 26, lines 3-6; 30, lines 31, 32). The District Court reversed the Referee's decision and held the debt to Appellants discharged on the ground that the compromise agreement of January 10, 1963, constituted a novation, whereby the Appellants accepted the note of Bankrupt and his wife in discharge of the antecedent tort claim. (1 TR 45, 47). This Appeal followed.

QUESTIONS PRESENTED.

The questions presented on this appeal are the following:

I. Whether the District Court's Decision is fully supported by substantial evidence and applicable law.

II. Whether the District Court erred in rejecting the Referee's Finding No. 9.

III. Whether the District Court erred in holding the Bankrupt's debt to Appellants discharged on the ground that the antecedent tort claim was extinguished by the novation agreement.

It is respectfully submitted that the District Court did not err and that its decision should be affirmed for the reasons set forth in the following argument.

ARGUMENT.

I.

THE DISTRICT COURT'S DECISION IS FULLY SUPPORTED BY SUBSTANTIAL EVIDENCE AND APPLICABLE LAW.

Appellee submits that the District Court's decision is fully supported by substantial evidence and applicable law. Appellee will establish the following points in support of the District Court decision:

A. The facts support the conclusion that the compromise agreement of January 10, 1963, was a novation agreement.

B. A novation agreement completely extinguishes the antecedent tort claim for all purposes, including proceedings under Bankruptcy Act, Section 17 a(2).

C. Even assuming this Court determines the parties did not enter into a novation agreement, proceedings under Bankruptcy Act, Section 17 a(2) are properly limited to the record in the Superior Court action.

A. The facts support the conclusion that the compromise agreement of January 10, 1963 was a novation agreement.

After setting forth the pertinent evidence in the record compromising the dealings, agreements and lawsuits between Appellants and the Bankrupt, the

District Court concludes that the compromise agreement of January 10, 1963, was intended by the parties to be, and is in fact, an express novation, whereby the Appellants accepted the promissory note of the Bankrupt and his wife in discharge of the tort liability of the Bankrupt:

> "In the instant case the note and agreement of January 10, 1963, contains *express language of novation, namely the substitution of the note for the (appellants') agreement not to institute or prosecute any claim, damage, loss, recovery or expense of any nature* arising out of the transaction between First Parties (Appellants) and Second Parties (Bankrupt, his wife, and Century) hereinabove referred to. *According to the agreement, the remedy of (Appellants) is restricted to an action upon the promissory note if the bankrupt defaults.* Inasmuch as there is no evidence in the record to support any other interpretation, the Court concludes that the intent of this agreement was not merely to evidence or suspend the debt, but to discharge the antecedent tort action." (Emphasis added) (1 TR 45).

What constitutes a novation? California Civil Code Sections 1530 and 1532 state that a novation is the substitution by agreement of a new obligation for an existing one, with intent to extinguish the latter. The substitution may be (1) of a new obligation between the same parties; or (2) of new parties, either new debtor, or new creditor. California Civil Code, Section 1531. A novation completely extinguishes the original obligation and a failure to perform the new one does not revive the old. *Alexander v. Angel* (1951) 37 Cal 2d 856, 236 Pac 2d 561. The *Alexander* case, *supra*, is the leading California case on the requisites and legal

effect of a novation; the Court there in affirming the trial Court's finding that a novation had in fact been intended and effected, stated at 236 Pac 2d, pages 564-565:

> "Where it satisfactorily appears that a new agreement was intended by the parties to take the place of an existing one, as is the case there since the parties proceeded to act for some fifteen months in reliance solely on the substituted agreement, it necessarily follows that the old agreement has been entirely abrogated or extinguished . . . . In consequence of such novation, the rights and duties of the parties must be governed by the new agreement alone, and a failure to perform thereunder does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation."

The United States Court of Appeals for the Ninth Circuit discussed the requisites and legal effect of a novation when affirming the District Court in *Olympic Finance Co. v. Thyret* (9th Cir 1964) 337 Fed 2d 62. The Court contrasted the respective rights and obligations of the parties before and after the execution of the novation agreement and held the agreement in question to be a novation.

In *Aetna Cas. and Surety Co. v. Bettins* (1953) 111 Fed Supp 111, the United States District Court, Southern District of California, held that where a surety on the principal's tax abatement bond paid the principal's taxes and, instead of bringing an action against the principal on the theory of subrogation to the rights of the United States, took the principal's note, a new obligation had been substituted for an

existing one and that the note accepted by the surety was discharged by the principal's discharge in bankruptcy. At page 113, the Court states:

> "It is noted that throughout the statutes and case law respecting a novation that the intent of the parties . . . . is a controlling factor. The Court cannot reconcile the conduct of the parties in this action with an intent to stand by the original cause of action. The fact that the surety allowed the statute of limitations to run thereon and accepted a promissory note, which when not paid on the due date, was succeeded by a new promissory note, and in turn, by others, all without reference to the original obligation, indicates that plaintiff intended to substitute the promissory note for an obligation implied in law . . . . By its acceptance of the note plaintiff accepted defendant's offer to substitute a new obligation with different and definite incidents in place of the old . . . . It gave the plaintiff certain additional rights including a definite contracted rate of interest and a right to collection costs in the event of suit on the note . . . . . "

In the leading case of *Maryland Casualty Co. v. Cushing* (7th Cir. 1948), 171 F 2d 257, plaintiff, surety in favor of defendant's employer, paid the employer $14,970.00 which sum had been embezzled by defendant, and thereby became subrogated to the right to sue defendant for conversion. Instead of suit for the conversion, plaintiff accepted defendant's note. When defendant filed bankruptcy, he claimed that plaintiff orally agreed to waive the antecedent tort in exchange for defendant's executing the note. The Court held that the note was given in consideration of plaintiff's waiver of the antecedent tort claim, that the tort claim

had been satisfied and discharged, and that the indebtedness on the note was barred by the discharge in bankruptcy. Although the Court speaks in terms of Accord and Satisfaction, rather than novation, the controlling factor is whether the parties bargained to substitute a new obligation for an antecedent tort claim.

To ascertain the intent of the parties, the Courts look to the terms of the agreement and to the conduct of the parties subsequent to the agreement. *Alexander v. Angel, supra; Olympic Finance Co. v. Thyret, supra; Aetna Cas. and Surety v. Bettins, supra.*

The compromise agreement of January 10, 1963, quoted at length in the Statement of the case and by the District Court in its opinion, contains express language of novation, whereby Appellants accept the note of the Bankrupt and his wife and Appellants do agree not to "institute or prosecute any claim, damage, loss, recovery or expense of any nature arising out of the transaction between First Parties (Appellants) and Second Parties (Bankrupt, his wife and Century) hereinabove referred to." (Objector's Exhibit 7). The language is absolute, not conditional upon Appellees payment in accordance with the terms of the note. In fact, the agreement restricts the remedy of Appellants to an action on the note if the Bankrupt defaults. (Objector's Exhibit 7, last sentence of paragraph 2). Moreover, Appellants reserve certain rights to proceed on the Century Enterprises, Inc. bond. (Objector's Exhibit 7, paragraph 3). Further, the preamble to the Agreement recites that by the execution of this Agree-

ment the parties intend to settle their disputes and avoid litigation. In short, the language of the Agreement compels a conclusion that, rather than bringing suit against the Bankrupt for the alleged conversion of funds, Appellants agreed to waive and forego that disputed claim, comprised the matter, and accepted a definite legal obligation in the form of an interest bearing note executed by the Bankrupt in his individual capacity and his wife. Appellants can hold new parties as a result of this novation agreement, since the Bankrupt's wife becomes obligated and the Bankrupt makes himself personally liable for what was a debt of the corporation, Century. In addition the note provides for a set rate of interest and attorneys fees in the event of default.

Appellants did not testify as to their intention in executing the Agreement of January 10, 1963, or at all. However, their actions clearly show that they regarded the promissory note as the measure of their rights against the Bankrupt. The Bankrupt and his wife paid and Appellants accepted $500.00 per month from March 1, 1963, through July 1, 1963. On November 15, 1963, Appellants commenced Superior Court Action No. 151227 pleading only the terms of said note and non-payment thereof. (Objector's Exhibit 6). Appellants did not plead conversion. When the parties entered into a Stipulation for Judgment, the Stipulation confessed judgment on the note and no attempt was made to classify the indebtedness as arising from a conversion. (Objector's Exhibit 5). Likewise the judgment is silent on the matter of con-

version. (Objector's Exhibit 8). Even after the hearing before the Referee and before his decision, Appellants pursued their legal remedies on the Superior Court Judgment by sale under a writ of execution. All of the foregoing conduct of Appellants over a period in excess of two years show that they looked to the Bankrupt on his note only.

The Bankrupt and his wife gave valuable consideration in return for Appellants' agreement to waive the conversion cause of action. The Bankrupt made himself personally liable for what was a debt of the corporation, Century. The signing of the agreement and note by the Bankrupt's wife made her separate property and earnings liable for the debt. California Civil Code, Sections 168 and 171. The Bankrupt regarded Appellants claim as disputed, contending he had not converted funds and that the claim was subject to the defense of usury. In compromising the matter, he surrendered these defenses. Likewise, the Bankrupt's personal undertaking may constitute a loss to the Bankrupt of the defense that Century had paid a usurious rate of interest to Appellants. See 3 Collier, Bankruptcy Section 63.07 at 1822-1824, 14th ed. 1964). In light of the foregoing, the discharge of the antecedent tort claim of Appellants was amply supported by consideration from the Bankrupt and his wife.

In view of the foregoing facts, Appellee submits that the Court was correct in holding that the compromise agreement of January 10, 1963, was a novation agreement and that the antecedent tort claim was extinguished thereby. Indeed, the express language of the

compromise agreement makes the instant case stronger factually than the *Cushing* case, *supra*, or the *Aetna* case, *supra*.

B. A novation agreement completely extingushes the antecedent tort claim for all purposes, including proceedings under Bankruptcy Act, Section 17 a(2).

The legal effect of a novation agreement is to completely extinguish the original obligation. In consequence of such an agreement, the rights and duties of the parties must be governed by the new agreement alone. *Alexander v. Angel, supra; Olympic Finance Co. v. Thyret, supra.*

Since the antecedent tort obligation is extinguished, it follows that it is improper to consider the antecedent tort claim in proceedings under Bankruptcy Act, Section 17 a(2). *Maryland Casualty Co. v. Cushing, supra; Aetna Cas. and Surety Co. v. Bettens, supra.*

There are persuasive reasons for this rule. First, the Court should honor the bargain of the parties, rather than to destroy their agreement by revivor of the antecedent debt. Secondly, many novations including the one at issue are in reality compromise and settlement agreements of disputed claims. A "compromise" is an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith or unliquidated; it is an amicable method of settling or resolving bonafide differences or uncertain-

ties and is designed to prevent or put an end to litigation. 15 Am Jur 2d, page 935. The law favors the resolution of controversies through compromise and settlement rather than through litigation; and the Courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. 15 Am Jur 2d, page 938. By honoring the terms of the compromise agreement in proceedings under Section 17 a(2), the Courts are merely following their established policy of encouraging settlement of litigation.

C. Even assuming this Court determines the parties did not enter into a novation agreement, proceedings under Bankruptcy Act, Section 17 a(2) are properly limited to the record in the Superior Court action.

In the hearing before the Referee and in the hearing before the District Court, Appellee has contended that there should be a limit to the scope of inquiry in proceedings under Section 17 a(2). Although the Courts are not uniform in their decisions, Appellee contends that the better reasoned cases are found in the majority view which allows evidence beyond the judgment in a prior case to an examination of the entire record in the prior case, but no inquiry outside that record.

National Finance Co. of Provo v. Daley (1963) 14 Utah 2d 263, 382 P2 405;

Hargadine-McKittrick Dry Goods Co. v. Hudson (C C Mo 1901) 111 Fed 361.

No good reason exists why the creditor should not be required to preserve his rights in the first action he files and prosecutes to judgment. Similarly no good reason exists why the Bankrupt should twice resist the creditors claim. In the instant case Appellants' claim arose in 1960 or 1961. Instead of preserving his claim as a non-dischargeable debt, he enters into the January 10, 1963, compromise agreement, accepts a note and payments thereon, sues on the note alone, takes judgment on the note alone, and executes on the judgment. It is only when Appellee files bankruptcy that he decides to urge an alleged conversion occurring in 1960. Appellee submits that Appellants should be estopped to go outside the record in the prior action.

II.

THE DISTRICT COURT DID NOT ERR IN REJECTING THE REFEREE'S FINDING NO. 9.

Appellants have contended that General Order No. 47 cast a mandatory duty on the District Court to accept the Referee's finding that the agreement of January 10, 1963, was an executory accord, and that it was error for the District Court to conclude that said agreement was a novation. Appellants further argue that the Referee was better able to determine the nature of the January 10, 1963, agreement because he had before him the "entire evidence." Appellees do not agree with either argument.

This Court is aware of its legitimate scope of review of a Referee's decision. It is not as restricted as Appellants would have one believe. General Order in Bankruptcy No. 47 grants broad powers to the Appellate Courts.

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his *findings of fact* unless clearly erroneous. The judge after hearing may adopt the report or *may modify it or may reject it in whole or in part* or may receive further evidence or may recommit it with instructions." (Emphasis added).

The Appellate Courts have a broad area of review where, (1) the credibility of witnesses is not a factor and (2) where the proper interpretation of an agreement is in issue.

Carr v. Southern Pacific Company (9th Cir 1942) 128 F 2d 764.

In *Olympic Finance Co. v. Thyret, supra*, this Court, in affirming the District Court's determination that the agreement in issue was novation, stated at page 68:

> "Much can be said in the case at bar for a higher degree of appellate review in light of the absence of any need to judge the credilibility of witnesses before the referee; the reviewing court is in an equally advantageous position to make factual inferences from an agreed-upon set of events . . . . . Reluctance is not encountered with regard to a factual conclusion from given facts. In the latter case, the proper conclusion from given facts can be made by the trial judge or the Court of Appeals, as well as the referee."

In the instant case, the proper interpretation of the January 10, 1963 agreement was in issue. Appellants did not testify regarding it, or at all. Consequently, the District Court could determine the nature of that agreement equally as well as could the Referee.

It is established appellate principle that the "unless clearly erroneous" standard does not apply to *conclusions of law. Utley v. United States* (9th Cir. 1962) 304 F 2d 746. The Referee stated in Finding of Fact No. 9 that the January 10, 1963 agreement was an executory accord. (1 TR 6). Although labeled a finding of fact, Appellee submits this was in reality a conclusion of law on the nature of the agreement. Therefore, it was proper for the District Court to reject such erroneous conclusion of law.

No useful purpose would be served to discuss Appellants citations to the Restatement of Contracts and excerpts from the works of Professor Corbin. The Court is aware of the distinctions between an executory accord, an accord and satisfaction and a novation. Suffice it to say that the Referee erred by concluding that the January 10, 1963 agreement was an executory accord; it was and is a novation agreement for the reasons stated in the learned opinion of the District Court.

III.

THE DISTRICT COURT DID NOT ERR IN HOLDING THE BANKRUPT'S DEBT TO APPELLANTS DISCHARGED ON THE GROUNDS THAT THE ANTECEDENT TORT CLAIM WAS EXTINGUISHED THROUGH THE NOVATION AGREEMENT.

Appellants argue that dischargeability of a debt should always be determined from the original character of the act on which the liability is based, regardless of the intervening steps the creditor may take to reduce his claim to money. (A.O.B. page 12). They choose to ignore the rights of the debtor and creditor to compromise and settle their disputes. They choose to ignore the prerogative of the parties to substitute a new well-defined obligation in place of antecedent disputed claim and thereby effect a novation or an accord and satisfaction. They choose to ignore the well-reasoned holding of the *Maryland Casualty* case and the *Aetna Cas. and Surety Co.* case. They urge this Court to adopt a rule wherein the creditor cannot be held to have waived the antecedent tort claim no matter what agreements he may enter and no matter what concessions he may obtain from the Bankrupt. Obviously the rule they urge would destroy the right to freely contract and would put an end to bonafide compromise and settlement agreements.

The cases cited Appellants for this novel position do not support it. None of the cases cited at pages 12 and 13 of Appellants' brief deal with the effect of a

creditors' execution of a novation or an accord and satisfaction. They merely held that inquiry can be made behind the judgment into the entire record in a prior action. *Fidelity and Casualty Co. of New York v. Golombosky* (1946) Conn. 317, 50 A 2d 817, holds that inquiry can be made to evidence outside the record in the prior action; however, it did not involve a compromise agreement in the nature of an novation or an accord and satisfaction; it is not, therefore, contrary to the holding of *Maryland Casualty Co., supra,* nor is it support for Appellants novel contention.

In summary, Appellee submits that the District Court properly held Bankrupt's debt to Appellants discharged on the ground that the antecedent tort claim was extinguished upon the execution of the January 10, 1963 novation agreement.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the decision of the District Court must be affirmed.

Respectfully submitted,

WATSON, TEDESCO & SANGUINETTI,
By RICHARD B. SANGUINETTI,
Attorneys for Appellee.

Certification

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Dated, June 10, 1966.

Richard B. Sanguinetti